

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 167
3024093

BETWEEN RITESH KHANNA
Applicant

AND S AND M SAHOTA LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: David Prisk for the Applicant
Ian Davidson for the Respondent
Submissions received: 6 and 21 April 2018 from the Applicant
23 April 2018 from Respondent
Date of determination: 23 May 2018

DETERMINATION OF THE AUTHORITY

- A. S and M Sahota Limited is ordered to comply with the settlement agreement with Ritesh Khanna, by paying to Ritesh Khanna the sum of \$11,760.00 within fourteen (14) days of the date of this determination.**
- B. S and M Sahota Limited is order to pay Ritesh Khanna the sum of \$71.56 being the filing fee, within fourteen (14) days of the date of this determination.**

Employment relationship problem

[1] Ritesh Khanna seeks an order for compliance in relation to payment of a compensatory sum under a record of settlement (the settlement agreement) made with his former employer S and M Sahota Limited (S and M Sahota Ltd or the company).

[2] At a case management conference held on 27 March 2018 the parties agreed that this matter could be considered on the papers. The parties were to attempt to reach an agreement on a payment plan, but if they could not, they were directed to file an agreed statement of facts by 4 April 2018.

[3] No such agreed statement was received, but Mr Khanna's representative informed the Authority that there has been no agreement as to a payment plan. That is not disputed by the company, however, it then applied for an order for payment by instalments, and provided a letter from its accountant.

[4] Mr Khanna's representative has confirmed that as of the date of this determination the sum is \$11,760.00 is still owing.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Settlement agreement

[6] The parties reached an agreement and signed the settlement agreement on 1 December 2017. On 13 December 2017 a Mediator from the Ministry of Business, Innovation and Employment signed the settlement agreement pursuant to section 149 of the Act.

[7] The settlement agreement provided for the payment by S and M Sahota Ltd of the compensatory sum of \$12,000.00 pursuant to s 123(1)(c)(i) of the Act within "7" of a mediator signing the terms of settlement.¹ Although there is no reference to seven "days" in that clause, the following clause refers to a payment for Mr Khanna's representative's costs, and that is to be paid within seven days of the mediator signing.

¹ Clause 6 of the settlement agreement

[8] I am satisfied that the reference to seven in clause 6 is to seven days. It would be highly unusual for a payment under a settlement agreement to be required in seven hours or seven weeks, for example. There has been no suggestion by the company that the money is not now payable.

The company's position

[9] In its statement in reply S and M Sahota Ltd accepts that it has not paid Mr Khanna the settlement amount by the due date. It says that it has used its best endeavours to make payments, however, arrangements to obtain funding to do so have fallen through, and it does not presently have funds to make a lump sum payment to Mr Khanna. It says that it has paid Mr Khanna's representative's costs, under clause seven of the settlement agreement.

Instalments

[10] S and M Sahota Ltd sought an order that it could pay Mr Khanna in instalments.

[11] When making a compliance order the Authority is given a discretion to order payments by instalments but only where the employer's financial position requires it.² I have a question about whether this provision applies to compliance orders regarding breaches of mediated settlements, at least where the parties have not agreed on an instalment plan. Allowing payment by instalments in that situation could be seen as effectively re-writing the terms of a settlement agreement, when s 149(3)(b) of the Act only allows the terms of settlement agreements to be brought before the Authority for enforcement.

[12] However, for the sake of completeness I will consider whether S & M Sahota Ltd meet the test for its financial position requiring instalments.

[13] For Mr Khanna it is said that the company's directors own three businesses, two properties and one of them recently bought a new car. There is some willingness to accept a repayment plan of significant amounts, but not at the level proposed for the company.

² S 138(4A) of the Act

[14] No financial accounts were filed regarding S and M Sahota Limited. However, a letter from a chartered accountant was provided. The extent of his involvement with the directors and the company was not clearly specified and the letter speaks in general terms. The accountant notes that some assets referred to on Mr Khanna's behalf, are owned by the company's shareholders as well as there being company held assets.

[15] The accountant says that he had assisted and reviewed the company's cash flow for their (presumably the director/shareholders') businesses. He referred to a previous statement by phone of the directors, Meena Sahota, that the company could afford instalments of \$500.00 per month. However, the accountant's view was that that would put the business under too much pressure and proposed instalments of \$250 per month. I note that this would result in payments taking around four years to complete.

[16] The test under s 138(4A) of the Act is more than one of the employer's convenience or preference even when the employer's financial position is not strong.³

[17] I have little evidence on which to base an assessment of the company's financial strength, other than by implication from the accountant's view on the \$500 per week offer, and the amount he suggested for instalments.

[18] I am not satisfied, on the information which I have, that the company's financial position can be said to require an order for payment by instalments.

Payments

[19] The time within which the payment was to occur has long past. S and M Sahota Ltd has made some modest payments at the rate of \$30 per week but the amount paid is small compared to the size of the amount overdue, which is \$11,760.00

Determination

[20] Under s 149 (3)(a) of the Act settlement agreements are final and binding and enforceable by the parties. It is in the public interest to have settlement agreements

³ *Stein v Garrard's (NZ) Limited* (unrep) ERA Auckland, AA 287/08, 8 August 2008, Member Monaghan

which are signed off by a mediator, honoured by the parties. This favours the making of an order for compliance.

[21] I find that it is appropriate for the compliance order sought to be made. I order S and M Sahota Limited to comply with the settlement agreement by paying to Ritesh Khanna the sum of is \$11,760.00 within fourteen days (14) days of the date of this determination.

Further non-compliance

[22] The Authority's orders may be the subject of further application for compliance in the Employment Court which is empowered to impose penalties for continuing non-compliance which include imprisonment, fines and the sequestration of property.

[23] An alternative procedure is provided under s 141 of the Act, enabling a party, by obtaining a certificate of determination from the Authority, to proceed to the District Court so that the determination can be enforced using the remedies available for a District Court order or judgment.

Costs

[24] No costs were sought for Mr Khanna's representation. I order S and M Sahota Limited to pay Ritesh Khanna within fourteen (14) days of the date of this determination, the sum of \$71.56 being the filing fee.

Nicola Craig

Member of the Employment Relations Authority